Yeng Chong Realty Sdn Bhd v Jiddi Joned Enterprise Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–914–04 OF 2012
DAVID WONG, UMI KALTHUM AND AHMADI ASNAWI JJCA
20 SEPTEMBER 2016

Land Law — Sale of land — Retention sum — Appellant entered into sale and purchase agreements of lands with first to fourth respondents — Fifth respondent acted as appellant's solicitor and stakeholder — Whether appellant deposited retention sum with fifth respondent — Whether appellant bore burden of proving that retention sum had been deposited with fifth respondent — Whether fifth respondent a stakeholder as defined by law

The appellant had entered into sale and purchase agreements with the first to fourth respondents for the purchase of four pieces of land located in Mukim Ayer Panas, Melaka. The fifth respondent in the present appeal was the solicitors acting on behalf of the appellant for the said sale and purchase transactions. By a letter dated 5 November 1997 ('the said letter'), the fifth respondent had confirmed that the appellant had deposited a sum of RM14,800,351.36 with the fifth respondent and a sum of RM4,148,836.28 ('the retention sum') had already been set aside for the payment of retention sum for real property gain tax ('RPGT'). Dispute arose when the appellant and the fifth respondent failed to pay the RPGT when requested by the Inland Revenue Board. The fifth respondent contended that the appellant had instructed them to write the said letter but did not deposit with them the sum of RM14,800,351.36 as final payment to the first to fourth respondents. The first to fourth respondents then commenced an action against the appellant and the fifth respondent at the trial court for the return of the said retention sum plus 10% tax increase payable on the unpaid RPGT. The trial judge found that the first to fourth respondent had proven their claim only against the appellant. Being dissatisfied with the said decision, the appellant filed the present appeal. The issues for decision were: (a) whether the appellant bore the burden of proving that the retention sum had been deposited with the fifth appellant; and (b) whether the fifth appellant became a stakeholder after issuing the said letter that RM14,800,351.36 had been deposited to his account.

Held, dismissing the appeal with costs of RM30,000:

(1) The learned judge had correctly decided that the burden of proof was on the appellant to show that the monies had been deposited with the fifth

respondent. The law is trite that he who asserts must prove. In this case, the appellant did not adduce any evidence as to the manner in which the money was deposited with the fifth respondent and just wholly relied on the said letter for the payment of the retention sum to the fifth respondent. The evidence against the appellant was overwhelming. From the facts, it was apparent that the appellant had failed to discharge the burden of proving that the retention sum had been deposited with the fifth respondent (see paras 25, 27–28 & 33).

(2) It is trite principle that a stakeholder does not effectively become liable in law unless and until the monies are deposited with the stakeholder. In application with the present case, without any proof of payment to the stakeholder and consequent to the factual finding by the learned judge that the monies were never deposited into the account of the fifth respondent by the appellant, obviously the appellant could not be discharged from liability. Thus, the fifth respondent was not a stakeholder as defined by law and the liability was still upon the appellant to make good the unpaid sum to the first to fourth respondents (see paras 39–40).

[Bahasa Malaysia summary

Perayu telah memasuki dalam perjanjian jual beli dengan responden pertama hingga keempat untuk belian empat bidang tanah terletak di Mukim Ayer Panas, Melaka. Responden kelima dalam rayuan ini adalah peguamcara yang bertindak bagi pihak perayu untuk transaksi jual beli itu. Oleh itu surat bertarikh 5 November 1997 ('surat'), responden kelima telah mengesahkan bahawa perayu telah mendepositkan satu jumlah sebanyak RM14,800,351.36 dengan responden kelima dan satu jumlah sebanyak RM4,148,836.28 ('jumlah penahanan') telah diperuntukkan untuk bayaran jumlah penahanan untuk cukai keuntungan harta tanah ('RPGT'). Pertikaian timbul apabila perayu dan responden kelima gagal untuk membayar RPGT apabila diminta oleh Lembaga Hasil Dalam Negeri. Responden kelima berhujah bahawa perayu telah mengarahkan mereka untuk menulis surat itu tetapi tidak mendepositkan kepada mereka jumlah sebanyak RM14,800,351.36 sebagai pembayaran akhir kepada responden pertama hingga keempat. Responden pertama dan keempat kemudian memulakan tindakan terhadap perayu dan responden kelima di mahkamah perbicaraan untuk pemulangan jumlah tahanan ditambah 10% kenaikan cukai yang kena dibayar atas RPGT yang belum dibayar. Hakim perbicaraan mendapati responden pertama dan keempat telah membuktikan tuntutan mereka hanya terhadap perayu. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan ini. Isu untuk diputuskan adalah: (a) sama ada perayu menanggung beban membuktikan bahawa jumlah penahanan itu telah didepositkan dengan perayu kelima; dan (b) sama ada perayu kelima menjadi pihak berkepentingan

selepas mengeluarkan surat bahawa RM14,800,351.36 telah didepositkan ke akaunnya.

Diputuskan, menolak rayuan dengan kos sebanyak RM30,000:

(1) Hakim bijaksana telah dengan betul memutuskan bahawa beban pembuktian adalah atas perayu untuk menunjukkan bahawa wang telah didepositkan dengan perayu kelima. Undang-undang tidak mempertikaikan bahawa orang yang menegaskan mestilah membuktikan. Dalam kes ini perayu tidak mengemukakan apa-apa keterangan tentang cara di mana wang itu didepositkan dengan responden kelima dan hanya bergantung sepenuhnya kepada surat tersebut bagi pembayaran jumlah wang penahanan kepada responden kelima. Keterangan terhadap perayu adalah amat besar. Daripada fakta, ia adalah jelas bahawa perayu telah gagal melepaskan beban membuktikan bahawa jumlah penahanan itu telah didepositkan dengan responden kelima (lihat perenggan 25, 27–28 & 33).

(2) Ia adalah prinsip biasa bahawa pihak berkepentingan tidak secara efektif menjadi bertanggungan dalam undang-undang melainkan dan sehingga wang didepositkan dengan pihak berkepentingan. Dalam permohonan dengan kes ini, tanpa apa-apa bukti pembayaran kepada pihak berkepentingan dan akibat daripada dapatan fakta oleh hakim bijaksana bahawa wang yang tidak pernah didepositkan ke dalam akaun responden kelima oleh perayu, jelas perayu tidak boleh dibenarkan dilepaskan dari liabiliti. Oleh itu, responden kelima bukanlah pihak berkepentingan sebagaimana yang ditakrifkan oleh undang-undang dan liabiliti itu masih di atas perayu untuk membayar jumlah wang yang belum dibayar kepada responden pertama hingga keempat (lihat perenggan 39–40).]

Notes

For a case on retention sum, see 8(3) *Mallal's Digest* (5th Ed, 2015) para 5295.

Cases referred to

Lee Yoke Chye v Toh Theam Bock & Co [1987] 1 MLJ 122, SC (folld)
OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal [2000] 1 MLJ 134; [2000] 1 CLJ 71, CA (refd)
Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd [1988] 1 MLJ 116, SC (folld)

Legislation referred to

Evidence Act 1950 ss 17, 18, 21, 103
Real Property Gains Tax Act 1976 s 21(4)

Appeal from: Civil Suit No S1–22–1468 of 2012 (High Court, Kuala Lumpur)

Gregory Dicom (Anita Thaiyub Khan with him) (AG Dicom & Co) for the appellant.
Deborah J Kaur (Soraya Jabid, Deborah & Co) for the respondents.

Ahmadi Asnawi JCA:

[1] This is an appeal by the appellant/first defendant against the decision of the High Court in Kuala Lumpur on 30 March 2012 in finding the appellant/first defendant liable for the respondents'/plaintiffs' claim.

[2] The parties are referred to in this judgment as they were referred to in the High Court.

[3] The claims sought by the plaintiffs via its writ and statement of claim dated 18 December 2002 are as follows:

(a) retention sum for real property gain tax ('RPGT'):

(i) the first plaintiff: RM1,705,154.89;

(ii) the second plaintiff: RM975,441.81;

(iii) the third plaintiff: RM702,761.80; and

(iv) the fourth plaintiff: RM765,478.56.

TOTAL: RM4,148,836.56;

(b) the additional 10% tax increase payable on the unpaid RPGT sums referred to in the paragraph above as follows:

(i) the first plaintiff: RM170,515.49;

(ii) the second plaintiff: RM97,544.18;

(iii) the third plaintiff: RM70,726.18; and

(iv) the fourth plaintiff: RM76,547.81.

TOTAL: RM414,883.66;

(c) interest on the sums referred to in prayer (a) enumerated above at the rate of 8%pa from 22 September 1997 until the date of judgment or at such other rate or period as this honourable court may deem fit;

(d) interest on the sums referred in prayers (a) and (b) above at the rate of 8%pa from the date of judgment until the date of full settlement; and

(e) costs.

In the alternative, the plaintiffs' claims against the second defendant are as follows:

(a) damages for misrepresentation to be assessed and paid by the second defendant to the plaintiffs;

(b) interest on the amount found to be due to the plaintiffs at such rate and for such period as the court may deem fit; and

(c) costs.

THE BACKGROUND

[4] The four plaintiffs had agreed to sell and the first defendant had agreed to purchase four separate pieces of land in Mukim Ayer Panas, Melaka, owned individually by each of the plaintiff, for the total sum of RM173,222,612.64.

[5] The plaintiffs (the respective owners of the said lands) and the first defendant thereafter entered into four separate sale and purchase agreement ('SPA') commonly dated on 23 April 1997.

[6] The second defendant had acted as the first defendant's solicitors in the said sale and purchase transaction.

[7] It is stipulated in the SPAs that the purchase price of the said lands are as follows:

The first plaintiff's land	:	RM71,278,013.96
The second plaintiff's land	:	RM40,657,057.06
The third plaintiff's land	:	RM29,546,748.00
The fourth plaintiff's land	:	RM31,739,793.62
Total purchase price	:	RM173,222,612.64

[8] It is also stipulated under cl 16.2 of the SPAs that the plaintiffs' solicitors were authorised to retain from the balance of the purchase price the sum required for the payment of RPGT.

[9] However, on 17 September 1997, the first defendant's solicitors had written to the plaintiffs' solicitors requesting that the retention sum be deposited with the first defendant's solicitors ie the second defendant as the stakeholder — see p 1246, Vol 5, record of appeal ('AR').

[10] By a letter dated 24 September 1997 at p 1247 of the same volume, the plaintiffs consented to the said request on condition that all interest accrued thereon are to the benefit of the plaintiffs.

[11] Subsequently, by letter dated 5 November 1997 (at p 1197, Vol 5, AR) the second defendant confirmed that the first defendant had on 22 September 1997 deposited a sum of RM14,800,351.36 with the second defendant and a sum of RM4,148,836.28 ('retention sum') had already been set aside for the payment of RPGT.

[12] The plaintiff's solicitors then wrote to the second defendant asking for an explanation on how the sum of RM4,148,836.28 was arrived at. By a letter dated 5 November 1997 (at p 1253, Vol 5, AR) the second defendant provided the account.

[13] The plaintiff pleaded that they had executed the memorandum of transfer in respect of the said lands as they were induced and had relied on the second defendant's abovesaid representation.

[14] Sometime in the year 1998–1999, the plaintiffs received notices of assessment from the Inland Revenue Board ('IRB') in respect of the said lands. The plaintiffs thereafter notified the first and second defendants of the aforesaid and requested for the release of the monies set aside for the RPGT.

[15] The request by the plaintiffs was ignored and no action was taken either by the first or the second defendants. As the assessed RPGT was not paid within the period of 30 days, by virtue of s 21(4) of the Real Property Gains Tax Act 1976, the RPGT was increased by 10% by the IRB.

[16] By letters dated 22 October 2002 and 23 October 2002 (at pp 1203 and 1205, Vol 5, AR) to the second defendant and the first defendant respectively, the plaintiffs demanded the release of the retention sum amounting to RM4,148,836.28.

[17] The second defendant responded via letter dated 23 October 2002 (at p 1204, Vol 5, AR) stating that having instructed them to write the letter dated 5 November 1997, the first defendant did not deposit with them the sum of RM14,800.351.36 as final payment to the plaintiffs.

[18] The plaintiffs then commenced this action against the first and second defendants for the return of the said retention sum plus the 10% tax increase payable on the unpaid RGPT.

[19] At the conclusion of the trial, the High Court found that the plaintiffs had proven their claim only against the first defendant. Dissatisfied with the said decision, the first defendant now filed this appeal.

A THE APPEAL

[20] The first defendant posited the following issues before us:

(a) whether the first defendant bears the burden of proving that the retention sum had been deposited with the second defendant? and

B

(b) whether the second defendant became a stakeholder after issuing the letter dated 5 November 1997 that RM14,800,351.36 had been deposited to his account?

C OUR DECISION

First issue

D **[21]** Learned counsel for the first defendant submitted that the learned judge had misdirected herself in deciding that the burden of proof was with the first defendant to establish that the payment of the retention sum was made to the second defendant.

E **[22]** Learned counsel for the first defendant submitted that there was an admission on the part of the second defendant that the monies were in their possession evinced by a letter dated 5 November 1997 from the second defendant to the plaintiffs which states that the first defendant had already deposited the sum of RM14,800,351.36 with him. Learned counsel for the first defendant contended that the said admission falls within the ambit of ss 17, 18 and 21 of the Evidence Act 1950, but was not considered by the learned judge. As such, the burden of proof shifted to the plaintiffs to show that the said monies were not deposited by the first defendant to the second defendant.

F

G **[23]** It was also submitted by learned counsel for the first defendant that the second defendant lied though it could not be ascertained when the second defendant had lied. It was not known whether the second defendant lied when he said the monies had already been deposited with him or whether he had lied when he said the monies had never been deposited with him and that the letter dated 5 November 1997 was sent out on the instruction of Lee Sung Yong (the first defendant's director who had passed away). Hence, counsel for the first defendant argued that the credibility of the second defendant as a witness was obviously doubtful as he was not a truthful or forth coming witness.

H

I **[24]** Additionally, it was also contended by the first defendant that the allegation made by the second defendant that the letter dated 5 November 1997 was written on the instruction of the said Lee Sung Yong who had passed away, was an attempt by the second defendant to veil itself. Furthermore, it was

only five years after issuing the letter dated 5 November 1997 that the second defendant now revealed for the first time that the monies were never deposited by the first defendant with him.

[25] On this issue, we opined that the learned judge had correctly decided that the burden of proof was on the first defendant to show that the monies had been deposited with the second defendant. The law is trite that he who asserts must prove — see s 103 of the Evidence Act 1950. The first defendant was ordered by the High Court to provide further and better particulars on how and when the payment was made by the first defendant to the second defendant. The said order was not complied with by the first defendant and as a result, the court ordered the relevant paragraphs of the first defendant's defence (paras 12, 16 and 17) to be struck out. As such, the defence by the first defendant that they had deposited the monies with the second defendant could not be sustained. Hence there was no longer any basis for the first defendant to rely on the alleged admission by the second defendant.

[26] We were of the view that in all the circumstances of the case, even with the said admission by the second defendant (vide letter dated 5 November 1997), the burden was still upon the first defendant to prove his assertion that the monies had been deposited with the second defendant on account that the evidence adduced appeared overwhelmingly supportive of the second defendant's averment that the first defendant did not deposit the said sum into his account after the 5 November 1997 letter was written and delivered to the plaintiffs. It was for the first defendant to invalidate the second defendant's defence.

[27] The retention sum was a large sum which would not have ordinarily been paid in cash but by a cheque or banker's cheque. The first defendant did not adduce any evidence as to the manner in which the money was deposited with the second defendant. The least the first defendant could do was to provide the details of the cheque number, the name of the bank, the date of the cheque and the date the said cheque was banked-in. As correctly pointed out by the learned judge, the first defendant wholly relied on the letter dated 5 November 1997 for the payment of the retention sum to the second defendant for the second defendant's onward transmission to the plaintiffs and did not provide any contemporaneous documents to prove their assertion.

[28] We were also of the view that the evidence against the first defendant was overwhelming. As pointed out by the learned judge, the first defendant did not reply to the letter of demand dated 23 October 2002 (exh P28) by the plaintiffs and neither did they allege that the monies were already deposited with the second defendant. If indeed the monies were deposited with the second defendant, surely the first defendant would have raised this matter

when the plaintiffs demanded for the payment of the retention sum. In fact, the reasonable thing for the first defendant to do was to lodge a police report against the second defendant if the monies had indeed been deposited with the second defendant. Additionally, the first defendant did not direct the second defendant as the stakeholder to release the monies as the stakeholder could not release the monies without the consent of the party which deposited the monies with the stakeholder.

[29] In response to the plaintiffs' letter dated 22 October 2002 (exh P26) demanding for the release of the monies, the second defendant had by letter dated 23 October 2002 (exh P27) informed the plaintiff's solicitors and carbon copied to the first defendant that after having been instructed to write the letter dated 5 November 1997, the first defendant did not deposit the said monies with the second defendant. Nevertheless the first defendant did not respond to the said letter to deny that the averment therein was not correct. The first defendant also did not lodge any police report if indeed the contents of the second defendant's 23 October 2002 letter was not correct.

[30] The contention by the first defendant that they had not referred the second defendant to the Disciplinary Committee of the Bar Council due to the fact they only had knowledge on this matter based on the letters subsequent to the death of the first defendant's director, Lee Sung Yong, could not hold water. As pointed out by the learned judge, two material letters dated 6 November 1997 (at p 1200, Vol 5, AR) and dated 11 February 1998 (at p 1248, Vol 5, AR) were carbon copied to the first defendant, well before the death of Lee Sung Yong in 1999. Hence, the first defendant could not plead ignorance of the issue as they were well informed.

[31] In May 2004, Tenaga Nasional Bhd had paid compensation to the second and fourth plaintiffs respectively for the acquisition of rights instead of compensating the first defendant and the first defendant appeared to have accepted the status quo. This fact, as pointed out by the learned judge clearly fortified the second defendant's claim that the first defendant had not made payment of the retention sum to the second defendant as the alleged stakeholder.

[32] In addition, the second defendant's contention that after he was instructed by the first defendant to issue the letter dated 5 November 1997, the first defendant did not deposit the money as alleged in the said letter was supported by his statutory declaration, his police report (exh P48), his affidavit affirmed on 8 July 2003 (exh P50) and his witness statement.

[33] From the narratives enumerated above the credit worthiness of the second defendant was never in issue. It was apparent that the first defendant had failed to discharge the burden of proving that the retention sum had been deposited with the second defendant.

Second issue

[34] We were with the learned judge that the evidence adduced had fortified the plaintiffs' position that the second defendant was appointed by the first defendant and that the plaintiffs had no objections to the first defendant's request to appoint the second defendant as the stakeholder.

[35] The issue was whether the second defendant became a stakeholder after issuing the letter dated 5 November 1997 that RM14,800,351.36 had been deposited into his account.

[36] The learned judge alluded to several authorities defining the role of a stakeholder. In *Lee Yoke Chye v Toh Theam Bock & Co* [1987] 1 MLJ 122, the Supreme Court defined 'a stakeholder' as:

> *Jowitt's Dictionary of English Law* (2nd Ed) defines 'stakeholder' as a person with whom money is deposited pending the decision of a bet or wager; a person who holds money or property which is claimed by rival claimants, but in which he himself claims no interest.

[37] In *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116, the Supreme Court held the meaning of a 'stakeholder' as:

> Whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.

In that case, the issue was whether the appellant was a stakeholder or whether he was a solicitor acting for the plaintiffs at the time he received the 5% deposit of the purchase price. The Supreme Court ruled, at p 118:

> In any particular case of sale and purchase, whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned judge concluded that in this case the appellant received the deposit as agent of the respondents in a fidiciary capacity and therefore on general principles he would be accountable.

[38] The first defendant contended that the monies had been deposited with the second defendant as its stakeholder and consequently, by law, the first defendant had fulfilled its obligation and was under no duty to ensure that the

second defendant paid the monies to the plaintiffs. Consequent thereto, the plaintiffs' remedies now lie only against the stakeholder, that is, the second defendant.

[39] The learned judge accepted and reiterated the trite principle gleaned from the above authorities that a stakeholder does not effectively become liable in law unless and until the monies are deposited with the stakeholder. We were with her. Applying the principle to the facts of the case now before us, without any proof of payment to the stakeholder and consequent to the factual finding by the learned judge that the monies were never deposited into the account of the second defendant by the first defendant, obviously the first defendant could not be discharged from liability. The case of *OCBC Bank (M) Bhd v Lee Lee Fah & Ors and another appeal* [2000] 1 MLJ 134; [2000] 1 CLJ 71 which was alluded by the learned judge, is on point:

> The position of a stakeholder in a sale and purchase agreement is clear. The purchaser, having deposited the money with the stakeholder ... By handing over the balance of the purchase price to the stakeholders, the company had done everything that needed to be done under the agreement. The company, in other words, had parted with the balance of the purchase price beyond recall to the stakeholders. The company, therefore, was under no duty to ensure that the money would actually be paid to the respondents.

[40] We were with the finding of the learned judge that there was no proof that the monies were deposited with the second defendant. To be more precise, the first defendant had not deposited the said monies (retention sum) into the account of the second defendant. As such we equally agreed with the finding of the learned judge that the second defendant was not a stakeholder as defined by law. The liability is still upon the first defendant to make good the unpaid sum to the plaintiffs.

CONCLUSION

[41] Accordingly, we unanimously agreed that the appeal of the appellant/first defendant against the decision of the High Court on 28 January 2015 against the appellant/first defendant be dismissed with costs of RM30,000. The deposit was to be refunded to the appellant/first defendant.

Appeal dismissed with costs of RM30,000.

Reported by Dzulqarnain Ab Fatar